**CHOR PHAIK HAR & ORS.**

**v.**

**CHOONG LYE HOCK ESTATES SDN. BHD. & ORS.**

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATUK MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: P-02-390-95]
1 APRIL 1996

***CIVIL PROCEDURE:*** *Estoppel - Application for distribution of estate of deceased - Whether deceased's estate includes a share in Otaheitte Estate - Whether deceased only had a limited power of disposal - Whether appellants held out that deceased had a share - Whether appellants estopped from contending otherwise - Estoppel not pleaded - Whether material.*

***CIVIL PROCEDURE:*** *Disputed lands registered in the name of the company - Whether appellants had any interest in the proceedings - Whether appellants should not have been impleaded in the action.*

On 26 August 1941 one Chor Bah Say (the deceased) entered into an agreement with the first respondent company (the company). The company is the registered proprietor of Otaheitte Estate (the estate). On 4 January 1943 another agreement was entered into between the company and the deceased (the 1943 agreement).

The deceased died in 1949 and letters of administration in respect of the deceased's estate were taken out in the same year.

On 12 April 1994 the respondents took out an originating summons by which they sought, inter alia, the distribution of the estate of the deceased. The appellants opposed the summons on the grounds that the 1943 agreement did not create any proprietory interest in Otaheitte Estate in favour of the deceased and they ought not to have been sued as the respondents conceded that the company was the proper party to be impleaded.

The learned Judge of the High Court found in favour of the respondents and the appellants appealed.

**Held:**

**Per Gopal Sri Ram JCA (delivering the judgment of the Court):**

**[1]** Although the term estoppel was never used in the Court below, the learned Judge, when deciding the case in the respondents' favour relied entirely on the appellants' conduct pointing to an admission by them that the lands

in question formed part of the deceased's estate. The learned Judge was quite right to do so as the facts and circumstances of the case warrant the conclusion that it would be inequitable for the appellants to succeed in this case.

**[2]** The circumstances of any case where the plea of estoppel is taken are to be viewed, not individually or separately, but together as forming the strands of a rope that coils itself around one who is alleged to be guilty of unconscionable conduct. When such an approach is taken there is no doubt that the totality of the circumstances of this case shows the appellants to have, by their conduct, admitted and held out to the world at large that the deceased had a share in the estate.

**[3]** The appellants' predecessors in title obtained letters of administration from the Court by representing to it that the deceased had the stated interest. The present appellants did nothing to correct the impression created by the terms of the letters of administration and they were content to continue to administer the deceased's estate on the footing that it included the interest they now seek to deny. In these circumstances to permit the appellants to now adopt a *volte face* would amount to countenancing a deception practised upon the Court and upon all those who examine the letters of administration.

**[4]** It is clear that the assertion by the appellants, by their conduct, that the deceased had an interest in the lands in question makes them necessary parties to the action. On the facts of the present case it was essential to have them before the Court to deal with the interest they had always asserted. Merely impleading the company would have been insufficient.

**[5]** In the circumstances of the present case the appellants have singularly failed to demonstrate any error on the part of the learned Judge. As it was clear that the appellants resisted the action upon unarguable grounds, the appellants are to bear the costs of the appeal personally.

*[Appeal dismissed. Order accordingly]*

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Estopel - Permohonan untuk pengagihan pesaka si mati - Samada pesaka si mati termasuk Ladang Otaheitte - Samada si mati hanya mempunyai kuasa melupus yang terhad - Samada perayu memperaku bahawa si mati berhak kepada satu bahagian harta - Samada perayu diestop dari mengatakan sebaliknya - Estopel tidak diplid - Samada penting.*

***PROSEDUR SIVIL:** Tanah yang dipersoalkan didaftarkan atas nama syarikat - Samada perayu mempunyai apa-apa kepentingan dalam prosiding - Samada perayu tidak harus di implid dalam tindakan.*

Pada 26 August 1941 seorang Chor Bah Say (si mati) melaksanakan satu perjanjian dengan syarikat responden pertama (syarikat). Syarikat adalah pemilik berdaftar kepada Ladang Otaheitte (Ladang tersebut). Pada 4 January 1943 satu lagi perjanjian telah dimeterai oleh syarikat dan si mati (perjanjian 1943).

Si mati meninggal dunia dalam tahun 1949 and surat mentadbir telah dikeluarkan pada tahun yang sama. Pada 12 April 1994 kedua-dua responden mengambil tindakan saman pemula memohon, antara lain, untuk pengagihan pesaka si mati. Perayu membantah saman berkenaan atas alasan bahawa perjanjian 1943 tidak menzahirkan apa-apa kepentingan milikan dalam Ladang Otaheitte kepada si mati, dan bahawa mereka tidak sepatutnya diajukan dengan tindakan saman pemula tersebut ekoran pengakuan oleh responden bahawa syarikat adalah pihak yang sebenarnya yang harus didakwa. Hakim Mahkamah Tinggi yang bijaksana membuat keputusan yang berpihak kepada responden, dan perayu merayu.

**Diputuskan:**

**Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):**

**[1]** Walaupun istilah estopel tidak pernah digunakan di Mahkamah dibawah, Hakim yang bijaksana, sewaktu membuat keputusan yang berpihak kepada responden, bergantung sepenuhnya kepada kelakuan perayu yang menunjuk kepada pengakuan oleh mereka bahawa tanah yang berkenaan menjadi sebahagian daripada pesaka si mati. Hakim yang bijaksana adalah betul dalam mencapai keputusan sedemikian oleh kerana fakta dan halkeadaan kes jelas menjurus kepada rumusan bahawa ianya adalah tidak adil bagi perayu untuk berjaya dalam kes ini.

**[2]** Halkeadaan sesuatu kes dimana estopel dibangkitkan tidak harus diteliti secara berasingan, tetapi hendaklah dilihat pada keseluruhannya sebagai utasan tali-tali yang mengikat seseorang yang dikatakan bertindak dengan tingkahlaku yang tidak wajar. Menggunakan pendekatan ini, jelas bahawa keseluruhan halkeadaan kes menunjukkan bahawa perayu, menerusi kelakuan mereka, telah mengaku dan memberi gambaran kepada semua orang bahawa si mati mempunyai bahagian dalam pesaka berkenaan.

**[3]** Pemegang hakmilik yang terdahulu kepada perayu telah memperolehi surat mentadbir dari Mahkamah dengan membuat representasi (kepada Mahkamah) bahawa si mati mempunyai kepentingan yang dikatakan itu. Perayu sekarang tidak berbuat apa-apa untuk membetulkan gambaran yang terbentuk oleh terma surat mentadbir tersebut, dan berpuashati untuk terus mentadbir pesaka si mati berdasarkan kenyataan bahawa pesaka tersebut merangkumi kepentingan yang dikatakan itu yang mana mereka sekarang cuba untuk menafikannya. Dalam keadaan sedemikian, membenarkan perayu mengubah pendirian sekarang bererti menyokong penipuan yang dilakukan terhadap Mahkamah dan terhadap kesemua mereka yang memeriksa surat mentadbir tersebut.

**[4]** Adalah jelas bahawa pengataan perayu, melalui tingkahlaku mereka, bahawa si mati mempunyai kepentingan dalam tanah yang terlibat telah menjadikan mereka sebagai pihak yang semestinya terbabit dalam tindakan ini. Berdasarkan fakta kes, adalah penting untuk perayu dibawa ke Mahkamah untuk mengendalikan perkara kepentingan yang diperkatakan oleh mereka. Untuk implidkan syarikat semata-mata adalah tidak memadai.

**[5]** Dalam halkeadaan yang wujud, perayu gagal menunjukkan apa-apa kesilapan di pihak yang arif Hakim. Oleh kerana jelas bahawa perayu menentang tindakan ini berdasarkan alasan-alasan yang tidak boleh dihujahkan, perayu mestilah menanggung kos rayuan ini secara peribadi.

*[Rayuan ditolak. Perintah sekadarnya].*

**Cases referred to:**

*Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd. [1995] 4 CLJ 283; [1995] 3 MLJ 331* ***(refd)***

*Habib Bank Ltd. v. Habib Bank AG Zurich [1981] 1 WLR 1265* ***(refd)***

*Ratnavale v. Lourdenadin [1988] 2 MLJ 371* ***(refd)***

*Shafto v. Bolkow & Co. (No. 1) [1887] 34 Ch. D. 725* ***(refd)***

*Thornhill v. Weeks [1912] 2 Ch. 464* ***(refd)***

**Other sources referred to:**

*Executors, Administrators and Probate,* Williams, p. 551

*For the appellants - Raja Aziz Addruse (Jannu Babjan with him); M/s. Lim Cheng Poh, Loh & Rahim*

*For the respondents - R.R. Sethu (R Rajasingam with him); M/s. R. Rajasingam & Co.*

## JUDGMENT

**Gopal Sri Ram JCA:**

Otaheitte Estate which is now known as Ayer Itam Estate is a well-known piece of property in Penang. It has a long history. And there has been much litigation about it.

The story began as long ago as 1941. On August 26 of that year, an agreement was entered into between Chor Bah Say (whom we shall, throughout this judgment, refer to as "the deceased"), and the first respondent company, which we shall, refer to hereafter as "the company". No one knows what that agreement was about. It has not surfaced. According to the affidavit of one Robert Choong Ewe Jin, a director of the company, affirmed on 4 April 1968 and filed in another suit (Civil Suit No. 64 of 1968), that document cannot be located.

Then, on 24 October 1941, an Indenture was made between one William Stewart and the company ("the Stewart Indenture'), under which William Stewart conveyed to the company all those heriditaments which comprised Otaheitte Estate for a consideration of RM140,000. The Stewart Indenture was

duly presented to the relevant registering authority under the provisions of the relevant legislation that governed immovable property in Penang at that time. The company is therefore the registered proprietor of Otaheitte Estate.

On 4 January 1943 another agreement ("the 1943 agreement") was entered into between the company and the deceased. It is actually dated 4 January 2603, that is to say, according to the calendar of Imperial Japan, to whose occupation this country was then subjected. It is a most important document to the present appeal: for upon its terms turns the whole argument of the appellants who are the personal representatives an some of the beneficiaries of the deceased's estate. We therefore reproduce its text in full.

> This agreement is made 4 January 2603 between Chor Bah Say of 159, Kimberly Street, Penang, trader of the one part and Choong Lye Hock Estates Ltd., whose registered office is situate at 59, Beach Street, Penang hereinafter called the company of the other part.
>
> Witnesseth as follows:
>
> 1. In consideration of the company paying to the said Chor Bah Say the sum of dollars: Fifty five thousand for payment to Khor Boon Hun for purchase or the surrender of the existing lease or leases on or over Otaheitte Estate now held by the said Khor Boon Hun to the company, such purchase being made at the request of the said Chor Bah Say, and the said Chor Bah Say and the company hereby agree as hereinafter mentioned.
>
> 2. The agreement dated 26 August 1941 and made between the company of the one and the said Chor Bah Say of the said Otaheitte Estate to the said Chor Bah Say is hereby cancelled and is of no further effect.
>
> 3. The said Chor Bah Say shall without remuneration be in management of the said Otaheitte Estate and shall collect all the income rents and profits thereof and account for same to the company whenever required to do so.
>
> 4. The said Chor Bah Say shall sell such part or parts of the said Otaheitte Estate as he shall deem fit but he must first obtain the written consent of the company for each such sale, the company to be at liberty to refuse such consent if they consider the price or prices inadequate.
>
> 5. All moneys to be obtained from the sale or sales of part or all of the said Otaheitte Estate shall be paid to the company and shall be applied together with the nett incomes rents and profits thereof to payment of:
>
>  (a) All moneys paid by the company for the purchase of the said Otaheitte Estate and interest thereon at the rate of RM1/50 *per centum per mensem* down to date hereof to be added as capitalised interest.
>
>  (b) Interest on all the moneys stated in (a) above and all moneys paid for the purchase or surrender of all existing leases on the said Otaheitte Estate from date hereof and from date of payment at the rate of -/75 cents *per centum per mensem* and also all expenses whatever incurred in the purchase of the said Estate.

(c) All moneys paid by the said Chor Bah Say and all reasonable expenses incurred by him in obtaining the sale of the said Otaheitte Estate to the company and all reasonable costs and expenses in obtaining the surrender or purchase of the existing leases of the said Estate.

(d) Similar interest at the rate of -/75 cents on all moneys 'except expenses' paid by the said Chor Bah Say toward the purchase of the said. Otaheitte Estate.

6. The balance money after payment of all the moneys stated in paragraph 5 hereof shall be divided as to three fourths thereof to the said Chor Bah Say and as to the remaining one fourth thereof to the company.

7. All losses (if any) to be incurred in the realisations or sale of the said Otaheitte Estate shall be borne as to one-fourth (¼) share thereof by the Company and as to the remaining three fourth (¾) share thereof by the said Chor Bah Say. Should his share of the losses exceed all the moneys paid and expended by him toward the purchase of the said Otaheitte Estate, the said Chor Bah Say shall pay such excess to the company.

8. The agreement shall be deemed to commence and take effect on 1 January 2603.

9. The said "Chor Bah Say" shall mean and include his personal representative and the term "The company" shall include their assigns.

10. If and when required by either party hereto a proper agreement or deed as the case may be setting out the above terms shall be drawn up and executed by the parties hereto.

In witness whereof etc.

The deceased died on 9 November 1949. He was survived by his widow Oh Kee Lee and children who included three daughters, namely, Chor Saw Soon, Chor Paik Gnor and Chor Phaik Har (the first appellant and one of the personal representatives of the deceased's estate). Later, Chor Paik Gnor died. The second respondent to this appeal is her personal representative.

On 13 December 1949, letters of administration in respect of the deceased's estate were granted to Chor Sin Kheng and Chor Paik Gnor. Later, on 19 March 1954, a limited grant of letters of administration were issued by the High Court at Penang to these two persons. It is common ground between the parties in this appeal that the lands that form the subject matter of the dispute, and which are part of Otaheitte or Ayer Itam Estate are, notwithstanding the terms of the 1943 agreement, disclosed in the letters of representation as forming part of the deceased's estate.

In 1983, another suit ("the 1983 suit") was commenced by one Oh Phaik Lin, Chor Saw Soon and Khoo Kay Hoo as Trustees of the estate of one Oh Kee Lee, deceased against the company, Chor Paik Gnor and the first appellant. An application was made for the appointment of interim receivers and managers

over Ayer Itam Estate as well as the deceased's estate. Edgar Joseph Jr. J (now FCJ) heard and granted the application on 1 March 1985. His written judgment on the matter is reported in **[1985] 1 CLJ 280** and it contains a succinct history of Otaheitte Estate.

The order made by Edgar Joseph Jr. J (which we will, for convenience call "the 1985 order") has two schedules. The first schedule to the order is headed "Ayer Itam Estate". Twelve titles are listed under it. All of them correspond with the titles shown in the Stewart Indenture. The second schedule to the order is headed "Estate of Chor Bah Say deceased". The seventh item in the second schedule refers to a "¾ share in lands set out in schedule I above." The titles of the lands appearing in the letters of representation reflect this share in the lands in question.

The relevance of the schedules to the 1985 order will appear when we come to consider the arguments advanced on behalf of the respondents.

We now turn to the litigation that is the subject of the present appeal.

On 12 April 1994, the respondents took out an originating summons by which they sought, *inter alia*, the distribution of the estate of the deceased. This summons was opposed by the appellants on two principal grounds. We will say more about these momentarily.

But what is abundantly clear is that the axis of the dispute between the parties in the present litigation turn upon the question whether the deceased's estate includes a share in Otaheittte Estate. In the Court below, and before us, the appellants argued for a negative response to this question: the respondents, on the other hand, argued for an affirmative answer.

The other point relates to the impleading of parties. The respondents conceded that the company was the proper party to be impleaded. In view of this, it was argued by the appellants that they had no interest in the matter and ought never have been sued.

The summons came before Vincent Ng J. After hearing the arguments of Counsel, he held in favour of the respondents and granted the relief claimed in the summons. He also found the appellants to have resisted the action upon unarguable grounds and, for that reason, ordered the appellants to bear the costs personally.

Before us, Raja Aziz of Counsel for the appellants, in the course of his oral argument, summarised his submissions in support of the appeal as follows:

(1) The 1943 agreement did not create, in favour of the deceased, any proprietary interest in Otaheittte Estate. All that that agreement did was to confer upon the deceased a purely contractual right that is binding between the appellants as the personal representatives of the

deceased and the company and is not capable of devolvement upon death;

(2) In view of the concession made by the respondents in the Court below, the learned Judge ought to have refused any relief against the appellants as they had no interest in the subject matter of the summons.

We now summarise Encik Sethu's submissions, supporting the judgment appealed from, as follows:

(1) The appellants' complaints are without foundation because the order made by the Judge is directed against the company and not the appellants;

(2) Whatever the 1943 agreement may say on its face, the appellants have, by their actings over a long period of time, held out that the deceased had a share in Otaheitte Estate. They are therefore estopped from now relying upon the written words of the 1943 agreement and contending that the deceased merely had a limited power of disposal;

(3) In any event, the 1943 agreement merely regulated pre-existing proprietary rights and does not create any new ones;

(4) The appellants were correctly impleaded as parties because of the deceased's interest in the lands in question.

In the midst of Encik Sethu's submissions, it became apparent that there were important questions of law which, through no fault of Counsel, had not been addressed by the authorities tendered to us in advance of the appeal. Accordingly, at the conclusion of the hearing on 21 November 1995, we directed Counsel on both sides to deliver written submissions and thereafter reserved judgment. In compliance with our directions, the last of the written submissions were delivered on 30 January 1996.

Raja Aziz, in his written response to the written submissions of Encik Sethu, has described the estoppel argument raised by the latter during the oral hearing as a point. In a sense this is quite correct. The expression "estoppel" does not seem to appear anywhere in the record of proceedings in the Court below. The term "estoppel" was used by Encik Sethu in response to a question put to him by a member of this Court during argument.

But it is interesting to note that the Judge, when deciding the case in the respondents' favour, relied entirely on the appellants' conduct pointing to an admission by them that the lands in question formed part of the deceased's estate. Of course, the Judge should have realised that, in essence, the respondents were relying upon the doctrine of estoppel. It is unfortunate that he did not recognise the creature before him for what it truly was. In fairness to him, neither did Counsel who appeared in the Court below. That is probably why the term "estoppel" was never used.

Does this really matter? We do not think it does. After all, there was no surprise in respect of the factual matrix that is relied upon to raise the estoppel. And Raja Aziz certainly makes no complaint of having been taken by surprise.

The first, second and sixth submissions in his written argument deal with the point as follows:

> (1) For estoppel to apply in this case, the appellants must have made a declaration or done an act with the intention of causing the respondents to believe a thing to be true and to act upon such belief s. 115 of the Evidence Act 1950.
>
> (2) A study of all the cases cited in *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* will show that in every instance the declaration in question was acted upon by the party invoking the doctrine.
>
> (6) There is no evidence to show that the statements (assuming them to amount to some form of admission) had caused the respondents to believe that the Estate of Chor Bah Say was entitled to a ¾ undivided share in the lands and that they had acted upon that belief. The first respondents (as a party to the 1943 agreement) and the other respondents (as beneficiaries to the Estate of Chor Bah Say), could not have been unaware of their rights under the agreement. It is, in any case, not open for them to claim that they were not aware of the true position of their rights and obligations under the agreement.

As we earlier observed, the Judge held in the respondents' favour based entirely upon the appellants' previous conduct. We think that he was right in doing so. In our judgment, the facts and circumstances of the case warrant the conclusion that it would be inequitable for the appellants to succeed in this case. We will explain why this is so, first by reference to the law governing the doctrine now under discussion, and second by reference to the relevant facts of this case.

First, the law. We take as settled beyond argument that estoppel is a flexible doctrine by which justice is done according to the facts of a particular case. It is therefore erroneous to apply the doctrine to the facts of a case, as though it were some form of legal straightjacket.

Although decided cases speak of some of the features of the doctrine, such as a declaration or a representation and an inducement, these are but statements made in the context of the facts and circumstances of the particular case in which they appear. At the end of the day, the Court has to answer the question: is it just that this particular litigant should, in the light of his conduct, succeed in the action, given the peculiar facts of the case? If the answer to that question is in the affirmative, then the doctrine does not apply; if it is in the negative, then it does.

No useful purpose will therefore be served by entering upon a discussion of the several cases that deal with the doctrine. They are but mere illustrations of a much wider principle and contain statements that are relevant to their peculiar facts.

For present purposes we think it quite sufficient to quote from two authorities to support the broad and liberal proposition that governs the operation of the doctrine.

The first is *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331, 344, where the Federal Court, when dealing with the application of the doctrine to a case of encouragement, made the following statement of principle:

> The time has come for this Court to recognize that **the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case.** It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed the circumstances in which the doctrine may operate are endless. (Emphasis supplied).

In respect of the argument that the party invoking the doctrine must demonstrate his reliance upon his opponent's conduct, the Federal Court said (at p. 347):

> The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, having undertaken a careful examination of the authorities, we are of opinion that this requirement is not an integral part of the doctrine. **All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a Court from which an inference may fairly be drawn that he was influenced by his opponent's actings. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so *influenced* by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict legal rights'** (per Robert Goff J in *Amalgamated Investment* [1982] 1 QB 84 at p. 105). (Emphasis added)

The second authority we cite is Habib *Bank Ltd. v. Habib Bank AG Zurich* [1981] 1 WLR 12651, where, at p. 1287 of the report, Oliver LJ, in the English Court of Appeal, approved, in the following passage, the observation by the trial Judge, Whitford J:

> I have to acknowledge my indebtedness to Counsel on both sides for some illuminating arguments, but at the end of them I find myself entirely unpersuaded that Judge erred in any material respect. He concluded his judgment in this way on the question of estoppel:

> Of course, estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of **a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding.**
>
> That, to my mind, sufficiently appears on the facts of this case. (Emphasis added).

In view of the approach taken by the Federal Court in *Boustead Trading (supra)*, we have no difficulty in rejecting the submission of Raja Aziz (contained in his written argument) on the scope and operation of the doctrine and what he perceives to be its requirements.

We now turn to the argument of Raja Aziz upon the evidential point. In order to properly appreciate his contention, it is necessary to see the facts and circumstance relied upon by the respondents in support of the plea of estoppel. They include the following:

(1) The lands in question are shown as forming part of the estate of the deceased in the letters of administration.

(2) The schedules to the 1985 order, in particular the second schedule, show the deceased to be the owner of a three-quarter share in Ayer Itam Estate.

(3) The statutory declaration made by the first appellant (in her capacity as one of the trustees and beneficiaries of the deceased's estate) in support of a caveat she lodged against the titles to the lands in question. In this declaration, the first appellant has suggested that she is entitled to enter a caveat because the company had, in the 1983 suit, admitted that the deceased is a co-owner of the lands.

Based on the foregoing, Encik Sethu has argued that there has been an admission by the appellants, or at the very least by the first appellant, that the deceased has an interest in the lands in question. That admission, he says, operates as an estoppel on the facts and circumstances of this case. His reliance upon the schedules to the order is based upon the premise, not challenged by Raja Aziz that the 1983 suit was an administration action and that all orders made therein bind the appellants, whether as beneficiaries or as personal representatives or trustees.

We think that there is merit in Encik Sethu's argument. The circumstances of this, or indeed any case where the plea of estoppel is taken, are to be viewed, not individually or separately, but together as forming the strands of a rope that coils itself around one who is alleged to be guilty of unconscionable conduct. When such an approach is taken, there is no doubt in our minds that the totality of the circumstances of this case show the appellants to have, by their conduct, admitted and held out to the world at large that the deceased had a share in Otaheitte Estate.

Among other matters, we mention the fact that their predecessors in title obtained letters of administration from the Court by representing to it that the deceased had the stated interest. That was the basis on which the letters were issued to them. The present appellants did nothing to correct the impression created by the terms of the letters of administration. They were content to continue to adminster the deceased's estate on the footing that it included the interest they now seek to deny. In these circumstances, to permit them to now adopt a *volte face* would, in our judgment, amount to countenancing a deception practised upon the Court and upon all those who examine the letters of representation.

As far as the 1985 order is concerned, the argument of Raja Aziz that his clients were not parties to the suit in which it was made has, in our judgment, been sufficiently met by Encik Sethu's argument that the 1983 suit was an administration action.

*Williams & Mortimer Executors, Administrators and Probate* (being a revised edition of the 15th edition of *Williams on Executors* and the 3rd edition of *Mortimer on Probate*) explains an administration action as follows (at p. 551):

> Where problems or disputes arise in the course of administration as between creditors, beneficiaries or personal representatives, the Court will normally be approached by writ or originating summons, for the purpose of resolving the difficulties and getting the estate properly administered. Such proceedings are known as administration proceedings and are to be distinguished from litigation adverse to the estate in which the personal representatives are involved as plaintiffs or defendants representing the deceased.

An examination of the carefully considered judgment of Edgar Joseph Jr. J, to which we have earlier referred, puts it beyond a preadventure that the 1983 suit was an administration action.

Further, there is no doubt that the appellants had every intention of taking the benefit of the 1985 order. Hence the caveat against the titles in reliance upon it. In our judgment, it would be unjust to permit the appellants to now contend that the order does not apply to them.

We now turn to consider one other point raised by Encik Sethu. It has to do with the affidavit of Robert Choong Ewe Jin in the 1968 suit to which we referred very early in this judgment. That affidavit was produced by the appellants as an exhibit under an affidavit sworn, filed and used in the Court below. Robert Choong has, in that affidavit, accepted that the deceased had a share in the lands in question.

Encik Sethu says that since it was the appellants who produced and relied on the affidavit, it is the same as they having called Robert Choong as a witness and he having given evidence adverse to them. In accordance with settled

principles, that evidence would, Counsel submits, bind the party who tendered it: See, *Ratnavale v. Lourdenadin* [1988] 2 MLJ 371, 380.

With respect, we do not think it possible to equate the annexing of an affidavit as an exhibit to another affidavit to the calling of a witness who ends up giving adverse evidence. The latter is a much clearer case. The former is not. For, a party may produce the affidavit filed in other proceedings to demonstrate that the particular deponent had made a previous inconsistent statement or an admission. So, it depends very much on the purpose or object which the party producing such an affidavit see to achieve.

Whatever its merits may be, we do not find it necessary to decide this appeal on the evidential point raised by Encik Sethu because of the other well-established circumstances which tell against the appellants. And of these we have already spoken.

For the reasons given, we are unable to agree with Raja Aziz's first submission namely, that the Judge was wrong in holding that the deceased had a share in the lands in question. Having read the judgment of the learned Judge with care, we are unable to disagree with him in respect of the conclusion he arrived at upon this issue.

That brings us to the second main point. The complaint made by the appellants, to recall, is that they have no interest in the proceedings should not have been impleaded because the lands are all registered in name of the company.

We think that the test to be applied in a case as the present is to ask the question: were the defendants (the appellants before us) necessary or proper parties? That question, when answered, one way or another, will determine the point taken.

Looking at the facts once again, it is clear that the assertion by the appellants, by their conduct, that the deceased had an interest in the lands in question makes them necessary parties to the action. See, for example, *Shafto v. Bolkow & Co (No. 1)* [1887] 34 Ch. D. 725.

On the facts of the present case, it was essential to have them before the Court to deal with the interest they had always asserted. See, *Thornhill v. Weeks* [1912] 2 Ch. 464. Merely impleading the company would have been insufficient.

For these reasons, we reject the arguments advanced by the appellants upon the second point.

The upshot is that the appellants have singularly failed to demonstrate any error on the part of the learned Judge. We therefore dismiss this appeal and affirm all orders made by the Judge. The respondents will have the costs of the appeal. The security deposit in Court will be paid out to them to account of

their taxed costs. For the reasons given by the Judge, the costs of this appeal will not be paid out of the estate of the deceased but by the appellants personally.

Reported by Satish Nair